Under Rule 56(e), to defeat a well supported motion for summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial, not merely "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Kline affidavit was untimely, irrelevant, and immaterial to Tulane's motion for summary judgment and created no genuine issue for trial. It likewise creates no ground for this Court's review.

II. The District Court Properly Granted Summary Judgment Dismissing Petitioner's FMLA and ADA Claims

In her second argument at page seven of her petition, Dutton contends that this Court should grant certiorari because of an alleged split in the circuits about "whether proof of mendacity is sufficient to present an employment retaliation and discrimination case to the jury under Rule 56." Again, Dutton states no valid reason for this Court to grant review.

This case does not involve a conflict between the circuits. In analyzing Dutton's claims and Tulane's motion for summary judgment, the Fifth Circuit properly articulated this Court's standards of review in discrimination cases:

> A plaintiff seeking to survive summary judgment . . . must point to some evidence establishing that the employer's proffered reasons are pretextual.

[Citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002).] In some instances, proof of pretext alone will be sufficient to preclude summary judgment. *Reeves*, 530 U.S. at 143 (stating that "a plaintiff's prima facia case, combined with sufficient evidence to find that the employer's asserted justification is false, *may permit* the trier of fact to conclude that the employer unlawfully discriminated") (emphasis supplied); *cf. Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 903 (5th Cir. 2000) (observing that it is "possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination"); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 371 (5th Cir. 1997). Indeed, the Supreme Court has instructed that, "[c]ertainly there will be instances where, although the plaintiff has established a prima facia case and set forth sufficient evidence to reject the defendant's case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder would conclude that the action was *discriminatory*." *Reeves*, 530 U.S. at 143 (emphasis supplied). *Reeves* suggests that whether a plaintiff can survive summary judgment must be decided on a case-by-case analysis, determinative of a number of factors, including, "the strength of the prima facia case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the

> employer's case and that properly may be considered." *Id.* at 148-149. The ultimate burden of persuasion lies "at all times with the plaintiff." *Id.* at 143.

See Dutton Appendix at 8-9. Applying these legal standards, the Fifth Circuit conducted a "careful review of the entire record" and correctly concluded that Dutton had failed to provide sufficient evidence of an FMLA retaliation claim under the specific facts of her case to survive Tulane's well-supported motion for summary judgment. *See* Dutton Appendix at 16-17. The decisions of the district court and the Fifth Circuit in this case are consistent with this Court's analysis in *Reeves*.

Tulane presented overwhelming evidence in support of its motion for summary judgment, documenting Dutton's chronic work-performance problems before and after her medical leave. In contrast, Dutton failed to provide any competent, relevant evidence to support her claims of discrimination under either the FMLA or the ADA. Indeed, as the court of appeals correctly recognized, Dutton's own deposition testimony refuted her claim of FMLA retaliation. *See* Dutton Appendix at 10 n.4, 15-16. Dutton's attempted rebuttal consisted only of "naked assertions, unsubstantiated by the record." *Id.* at 14. The Fifth Circuit likewise observed that "Dutton's own deposition testimony cited above acts as her Achilles heel" and that she "virtually admits she had no ADA claim." *Id.* at 18. Furthermore, in addition to finding the ADA claim meritless, the district court correctly held that it was time-barred. *See* Dutton Appendix at 37-41. Both of the courts below properly awarded Tulane statutory attorney's fees under 42 U.S.C. § 12205, recognizing that Dutton's ADA claim was so totally devoid of merit that she should never have persisted in litigating it.

The foregoing indisputable facts readily refute Dutton's unsubstantiated assertions at page three of her petition that "without prior warning, [she] received written disciplinary action for alleged poor performance", that "Failla left Dutton's accounts uncollected while she was on leave", that "Dutton's counterpart, Collection Supervisor Sarah Lewis, performed at lower levels than Dutton, and was not disciplined", and that "Dutton had no previous written warnings or disciplinary actions regarding her work in her personnel file." *Id.* Dutton's job-performance problems were documented before and after her medical leave, and Tulane gave her multiple chances to improve before terminating her employment.

Based on these undisputed facts and the controlling law, this was a classic case for a summary judgment of dismissal in any circuit. The result would be the same regardless of the venue. Numerous other courts have granted summary judgments under similar circumstances. *See, e.g., Smith v. Allen Health Sys., Inc.*, 302 F. 3d 827 (8th Cir. 2002) (before employee left on FMLA leave, employer had counseled her about delays in doing her work and later discovered undone work dating back as much as two months); *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 10 (1st Cir. 2001) (adverse actions taken against employee were part of employee's deteriorating relationship with employer that began before employee took FMLA leave); *Matthews v. Independence Blue Cross*, 2002 WL 7930 (E.D. Pa. Dec. 28, 2001) (unfinished work, including unprocessed and outdated documents, were discovered during employee's FMLA leave).

Dutton's inconsistent positions in this lawsuit likewise undermine her petition for certiorari. Dutton did not present her conflict-of-decision arguments to the court below, nor

raise any question about interpretive regulations from the Equal Employment Opportunity Commission. At page nine of her certiorari petition, she now alludes to alleged evidence of her "inability to work at all while in surgery, while recuperating from surgery, and during additional testing[.]" Yet, in the trial court, Dutton had asserted that Tulane knew about her two outside jobs. And, she testified in her deposition about her third job during medical leave. Had Tulane known of Dutton's moonlighting while on leave for medical reasons, it would have discharged her from her employment. For this reason, the Magistrate Judge in the trial court allowed Tulane to add an affirmative defense of after-acquired evidence to its answer. These examples of Dutton's groundless and contradictory positions led the Chief Judge of the Eastern District of Louisiana and a three-judge panel of the Fifth Circuit to conclude that attorneys' fees were warranted under 42 U.S.C. § 12205 on the dismissal of Dutton's baseless ADA claim.

Significantly, Fifth Circuit Rule 47.5 requires publication of an opinion when it "[c]reates or resolves a conflict of authority within the circuit or between this circuit and another" or "[c]oncerns or discusses a factual or legal issue of significant public interest." In this case, Chief Judge King and Judges Benavides and Stewart of the Fifth Circuit unanimously decided not to publish their decision because it raised no issue of any importance beyond the dispute between the party litigants. Under Fifth Circuit Rule 47.5, "[t]he publication of opinions that merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." A case such as this is certainly not worthy of review by this Court. *See* R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, 459 (8th ed. 2002).

The Fifth Circuit correctly recognized this case for what it is – a meritless suit ripe for dismissal by summary judgment and affirmance on appeal in an unpublished opinion, because plaintiff had no competent evidence to raise a genuine issue of material fact for trial or prove the essential elements of her claims. For the same reasons, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, Respondent, University Healthcare System, L.C. d/b/a Tulane University Hospital and Clinic, respectfully asks this Court to deny Dutton's Petition for Writ of Certiorari.

Respectfully submitted,

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